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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

COLIN FRASER,

Plaintiff and Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant and Respondent.

A154105

(Contra Costa County
Super. Ct. No. C1500024)

Colin Fraser sued Wells Fargo Bank, N.A. for racial discrimination, retaliation and wrongful termination in violation of the California Family Rights Act (CFRA) and California Fair Employment and Housing Act (FEHA). His complaint alleged that Wells Fargo fired him in retaliation for asking to take family medical leave and because he is Caucasian. Wells Fargo successfully moved for summary judgment on the ground that Fraser could not show its legitimate reason for terminating him was a pretext for retaliation or discrimination. Our de novo review confirms the trial court's assessment of the evidence, so we affirm.

DISCUSSION

I. Summary Judgment Standards

Summary judgment is proper when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review a ruling granting summary judgment de novo. (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798 (*Horn*).) “We accept as true the facts alleged in the evidence of the party opposing summary judgment and the

reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show “specific facts,” and cannot rely upon the allegations of the pleadings.” (*Id.* at p. 805.) We review the court’s ruling, not its rationale, and we affirm if it is correct for any reason. (*Ibid.*)

II. Burden Shifting in Employment Discrimination Cases

California has adopted the federal burden-shifting test for assessing wrongful discharge claims. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354 (*Guz*); *Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 236; *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.) First, the plaintiff must establish a prima facie case of discrimination. “While the plaintiff’s prima facie burden is ‘not onerous’ [citation], he must at least show “actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were ‘based on a [prohibited] discriminatory criterion’ ” ” (*Guz, supra*, at p. 355.) If the employee meets this burden, a presumption of discrimination arises and the burden shifts to the employer to show that its action was taken for a legitimate, nondiscriminatory reason. If the employer proffers a legitimate reason for acting, the presumption of discrimination disappears and the employee must prove the employer’s reason was pretextual, or produce other evidence of discriminatory motive. (*Id.* at pp. 355-356; *Horn, supra*, 72 Cal.App.4th at p. 807.) The ultimate burden of persuasion remains with the plaintiff. (*Guz, supra*, at p. 356.)

III. Application of the Burden Shifting Test to Summary Judgment in FEHA Cases

In a FEHA case, when an employer moves for summary judgment and “presents admissible evidence . . . that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant’s showing.” (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) When the employer meets its burden to show a legitimate reason for its actions, to avoid summary judgment the employee “ ‘must offer substantial evidence that the employer’s stated nondiscriminatory reason for the adverse action was

untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.’ ” (*Horn, supra*, 72 Cal.App.4th at pp. 806-807, quoting *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005; accord, *Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1058; *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 154; *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.)

“[S]ummary judgment for the employer may thus be appropriate where, given the strength of the employer’s showing of innocent reasons, any countervailing circumstantial evidence of discriminatory motive, even if it may technically constitute a prima facie case, is too weak to raise a rational inference that discrimination occurred.” (*Guz, supra*, 24 Cal.4th at p. 362.)

“Although an employee’s evidence submitted in opposition to an employer’s motion for summary judgment is construed liberally, it ‘remains subject to careful scrutiny.’ [Citation.] The employee’s ‘subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations.’ [Citation.] The employee’s evidence must relate to the motivation of the decision makers and prove, by nonspeculative evidence, ‘an actual causal link between prohibited motivation and termination.’ ” (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1159)

IV. Application

Fraser, who is Caucasian, began working for Wells Fargo in 2003. In 2007 he transferred to the Blackhawk branch, where he worked as a personal banker until he was discharged on May 24, 2012. He asserts he was fired in retaliation for requesting family medical leave to care for his wife and so that his district manager, Ashoo Vaid, could hire a replacement of Indian ethnicity or origin. We will assume, as the trial court found, that Fraser’s showing established a prima facie case of discrimination and retaliation.

Wells Fargo moved for summary judgment based on evidence that Fraser was terminated for falsifying bank records in order to open college checking accounts for ineligible children, a violation of the Bank's Code of Ethics.

Fraser is flagged in an audit, investigated, and terminated

Fraser was trained on and required to follow the Bank's employee handbook and Code of Ethics. The Code of Ethics requires employees to prepare and maintain accurate records and expressly prohibits them from falsifying records or entering false information into the Bank's record system. The written policy specifies that falsifying records to include fictitious customer information in a Bank record or system was grounds for immediate dismissal. Fraser understood he could be terminated for violating the Code of Ethics.

Wells Fargo adduced evidence that in 2012 Fraser falsified bank records to open college checking accounts for four children who were neither college students nor old enough to qualify for such Wells Fargo accounts. To be eligible for those accounts, customers must be college students and present a college identification card or other proof of enrollment. The banker must verify that he or she confirmed the applicant's college enrollment in the Bank's computer system. Fraser was aware that opening college accounts for customers who did not meet the eligibility criteria violated the Bank's written policy.

Wells Fargo's sales quality team monitors bank products and services to identify trends, provide internal business groups with analytical data, and detect potential instances of fraud and other employee wrongdoing. In early 2012, Steven Herfindahl, a Wells Fargo sales quality analyst in Omaha, Nebraska, was tasked with analyzing college checking accounts opened for minors under the age of 13. In April 2012 he designed an audit to determine how many such accounts were opened during the first quarter of 2012. Herfindahl studied this period for several reasons, including that three months is a standard sample duration in Wells Fargo audits, it provides a statistically significant sample size, and it is brief enough to follow up with customers before their memories fade.

Herfindahl's audit revealed that 27 employees across the entire company opened at least one college checking account for a minor younger than 13. Fraser was the only employee who opened four such accounts during the audit period, and the only one in the 99.99th percentile on that parameter, a standard Wells Fargo routinely used to identify "outlier" employees for further investigation.

Herfindahl reported Fraser to Investigations Manager Glen Najvar in San Antonio, Texas. He did not report the other 26 other employees because none of them fell in the 99.99th percentile. Najvar, in turn, referred Fraser to Corporate Investigations for further review for possibly falsified bank records. Neither Herfindahl nor Najvar ever met or spoke with Fraser. Neither was aware of his race or that he had ever taken or requested a leave of absence.

On April 20, 2012, the Bank's Corporate Investigations department received the case referral. On May 18 investigator Joniann Hookfin interviewed Fraser about the four suspect accounts. Fraser had falsified account information about the children's schools and expected graduation dates. "Customer 1" was eight years old. Fraser input "Branham," an elementary or junior high school, as the university attended. "Customer 2" was 11 years old. Fraser again input "Branham" as the university. "Customer 3" was 11 years old and home-schooled. Fraser input "DVC" as the university. "Customer 4" was 12 years old. Fraser input Diablo Vista, a middle school, as the university. Fraser admitted to Hookfin that he used false information to open the accounts "to push the sale through."

Hookfin recommended to District Manager Vaid and Human Resources Advisor Rosanne Talcott, among others, that Fraser be terminated for falsifying bank records in connection with opening accounts for the four ineligible minors. Vaid, in consultation with Talcott, made the final decision to terminate Fraser's employment based on Hookfin's recommendation. Neither Vaid, Hookfin nor Talcott were aware at the time that any other employees were identified in the audit or may have committed the same misconduct.

On the morning of May 24, Fraser sent Wells Fargo an email asserting the Bank was retaliating against him for requesting a future medical leave of absence to care for his wife. The Bank terminated his employment the same day.

Fraser's requests for leaves of absence

In mid-March 2012, Fraser asked to take one day off in April for his wife's back surgery. He told his supervisor, Nick Gould, that he needed to preserve his available family medical leave time in case the surgery was unsuccessful, and his wife required a second, more extensive procedure.

On April 28, after Fraser's case had been referred for investigation, he learned his wife would require the second surgery. On May 11 he spoke with an employee in the Bank's human resources department about taking intermittent leave before the second surgery and a full leave of absence after it. At the employee's direction he filled out a form requesting a leave of absence from July 10 through September 10, 2012, but his branch manager, Nick Gould, would not sign it. Fraser never submitted the form to Wells Fargo's leave department.

Wells Fargo also adduced evidence that in late 2010 Fraser took two leaves of absence in connection with his wife's surgeries. During the second of those leaves the Bank investigated the entire Blackhawk branch for improperly opening accounts. Twelve or thirteen employees were fired as a result of the investigation, but Fraser was not disciplined.

Analysis

Viewed in accord with the applicable standard of review, the above evidence satisfied the Bank's burden of showing its decision to terminate Fraser's employment was based on a legitimate business reason. Critically, undisputed evidence established the lack of any connection between the audit that resulted in his termination and local managers' alleged animus against him due to his race or request for family medical leave. The audit was initiated weeks before Fraser inquired about taking a leave of absence. It was designed and conducted by Herfindahl in Nebraska, who had never met or spoken with Fraser and knew nothing of his race or request for a leave. The decision to escalate

Fraser's case for investigation based on the audit results was made by Najvar in Texas, who also lacked any connection with or knowledge of Fraser. Fraser was investigated because he was the only "outlier" employee identified by the audit. And when interviewed by investigator Hookfin, he admitted he falsified bank records to open the accounts.

In light of this evidence, the burden shifted to Fraser to show that Wells Fargo's stated reason for his termination was pretextual or his firing was motivated by discriminatory or retaliatory animus. " 'To avoid summary judgment, [appellant] 'must do more than establish a prima facie case and deny the credibility of the [defendant's] witnesses.' [Citation.] [He] must produce "specific, substantial evidence of pretext." [Citation.]' [Citation.] We emphasize that an issue of fact can only be created by a conflict of evidence. It is not created by speculation or conjecture." (*Horn, supra*, 72 Cal.App.4th at p. 807.) " '[T]he plaintiff may establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." ' [Citation.] Circumstantial evidence of ' "pretense" ' must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate "on an improper basis. [Citations.] With direct evidence of pretext, ' "a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." ' ' " (*Morgan v. Regents of University of California, supra*, 88 Cal.App.4th at pp. 68-69.)

Fraser did not satisfy his burden. He proffered no evidence that Herfindahl or Najvar were aware of his race or his requests for leave; that any other Wells Fargo employee fell in the 99.99th percentile that triggered further investigation; or that either the 99.99th percentile cutoff or the three-month period selected for the audit were chosen to further a discriminatory or retaliatory agenda against him. Nor is there evidence the personnel involved in the decision to terminate Fraser—Hookfin, Talcott, and Vaid—were aware of other individuals who may have committed the same misconduct but were not investigated or punished.

Fraser argues there is no evidence as to why Najvar and Herfindahl initiated the audit or who suggested that they do so. From this he speculates that passages redacted from an investigation report the Bank produced in discovery would have shown the audit was initiated by Vaid, supporting Fraser's theory that it was designed to trump up a bogus reason to fire him. The Bank disagrees. It says it redacted the report to comply with an evidentiary privilege protecting certain bank documents prepared in compliance with federal requirements for reporting suspicious banking activity. See *Union Bank of California v. Superior Court* (2005) 130 Cal.App.4th 378; 31 C.F.R. § 1020.320(e) (2011).) Fraser argues the privilege is inapplicable. We need not resolve this particular dispute. Even assuming the Bank should have produced the full document, there is no evidence to support a rational inference the redacted portions would show, as Fraser claims, that Vaid secretly initiated the nationwide audit by contacting Najvar in Texas, somehow knowing that an audit of the entire Wells Fargo corporate structure would identify Fraser as an outlier and provide grounds to fire him. Fraser's speculation falls far short of substantial evidence that Wells Fargo's stated reason for his termination was pretextual. (See, e.g., *Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1059.)

Alternatively, Fraser argues the timing of his firing shortly after he inquired about taking a substantial leave of absence supports an inference that Vaid fired him not for falsifying bank records, but in retaliation for his request. The trial court disagreed, as do we. "Temporal proximity, although sufficient to shift the burden to the employer to articulate a nondiscriminatory reason for the adverse employment action, does not, without more, suffice also to satisfy the secondary burden borne by the employee to show a triable issue of fact on whether the employer's articulated reason was untrue and pretextual." (*Loggins v. Kaiser Permanente International* (2007) 151 Cal.App.4th 1102, 1112 (*Loggins*) [evidence that adverse employment action followed closely after employee's telephone call to hotline did not support inference of pretext]; *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377.) The

“contrary argument, if accepted, would eviscerate the *McDonnell Douglas*¹ framework for resolving claims at the demurrer or summary judgment stage, because the same minimal showing required of the plaintiff to raise a prima facie case would also suffice to preclude the employer from obtaining summary judgment notwithstanding otherwise un rebutted proof of articulated legitimate reasons for the employment termination. Instead, an employee seeking to avoid summary judgment cannot simply rest on the prima facie showing, but must adduce substantial additional evidence from which a trier of fact could infer the articulated reasons for the adverse employment action were untrue or pretextual.” (*Loggins, supra*, 151 Cal.App.4th at pp. 1112-1113.)

Relying on *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510 (*McGrory*), Fraser asserts he raised a sufficient inference of pretext because Blackhawk branch manager Gould was not disciplined even though he was responsible for reviewing any accounts Fraser opened and explicitly approved two of the fraudulent college accounts. Here too, we disagree. “To establish discrimination based on disparate discipline, it must appear ‘that the misconduct for which the employer discharged the plaintiff was the same or similar to what a similarly situated employee engaged in, but that the employer did not discipline the other employee similarly. [Citation.] . . . ‘Different types and degrees of misconduct may warrant different types and degrees of discipline.’ [Citations.] No inference of discrimination reasonably arises when an employer has treated differently different kinds of misconduct by employees holding different positions.” (*McGrory, supra*, at p. 1535-1536.) Fraser falsified account information in violation of the Bank’s Code of Ethics. His manager did not.² As Vaid testified, “This is about violation of code ethics and falsification of records, not about

¹ *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.

² For reasons that are unclear from the record, Gould stepped down from his managerial position on May 18 2012 to become a regional personal banker in the same district. He testified he requested the change because he preferred the personal banking side of the business. Vaid testified that Gould requested the change for family reasons, but there was also evidence suggesting he was removed from the store manager position for bad judgment.

inspection.” Maybe it would have been a better practice to also investigate whether Fraser’s supervisors bore responsibility for his violation, but the Bank’s failure to broaden its inquiry does not support an inference that its actual motive was discriminatory or retaliatory. (See *Guz, supra*, 24 Cal.4th. at p. 381 [100 Cal.Rptr.2d 352, 8 P.3d 1089] (conc. & dis. opn. of Kennard, J.) [issue is discriminatory animus, not whether employer’s decision was wrong or mistaken].)

Nor is it material, as Fraser asserts, that Vaid confirmed with the human resources department that Fraser was not actually on family medical leave before terminating his employment. Vaid explained, “we want to make sure that [employees] have—that’s their benefit. That’s their right to take leave. If the paperwork is approved, we don’t want to make a mistake and, you know, terminate somebody who is either going to be on the leave or who is already on leave.” Nothing in this unsurprising policy supports an inference, alone or in conjunction with Fraser’s other evidence, that the Bank’s stated reason for terminating his employment was pretextual.

Fraser also cites the following as evidence that Vaid fired him at least in part because he is Caucasian: (1) In 2010 Vaid hired a person of Indian descent into a job for which Fraser asked to interview; (2) after Fraser was terminated Vaid hired an Indian woman to replace him; (3) Vaid called him “Mr. Colins” rather than “Mr. Fraser” and used an accusatory or derogatory tone in addressing him; and (4) Vaid criticized him for spending too much time working on new equity lines of credit rather than checking accounts. Not so. The cited remarks have nothing to do with race or racial animus, and two discrete instances of hiring applicants of Indian descent over Fraser over a two-year period do not support an inference that Vaid made employment decisions on the basis of race rather than performance, aptitude, or other valid reasons. Fraser also asserts an inference of pretext was raised by what he characterizes as Vaid’s “inconsistent and incoherent” testimony, but the cited testimony does not support his characterization.

In sum, evaluating the totality of the evidence and drawing all reasonable inferences in his favor, Fraser was unable to rebut the Bank’s showing that it terminated his employment for falsifying account information. Summary judgment was therefore

properly granted. This determination renders Fraser's claim for punitive damages moot, so we will not address it.

DISPOSITION

The judgment is affirmed.

Siggins, P. J.

WE CONCUR:

Petrou, J.

Wick, J.*

* Judge of the Superior Court of Sonoma County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution